No. 94-1937

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COALITION FOR FREE AND OPEN ELECTIONS; PROHIBITION PARTY; EARL F. DODGE, Prohibition Party Nominee for President of the United States; GEORGE OBMSBY, Prohibition Nominee for Vice-President of the United States; LUTHER KENNICUTT; WALTER KENNICUTT; HAZELLE KENNICUTT; AARON STRANGE; EILEEN SCHUMAKER; ROBERT M.BLAIR; MRS. ROBERT M. BLAIR; HYLDA SHILLINGTON; NEW ALLIANCE PARTY; LENORA B. FULANI; Nominee for the Nomination of the New Alliance Party for President of the United States; SOCIALIST PARTY USA; J. QUINN BRISBEN, Socialist Party Nominee for President of the United States; WILLIAM D. EDWARDS, Socialist Party Nominee for Vice-President of the United States; MARIA LUIKART; EVELYN POWELL; DARIN ROHRER; DAN BOGGS; ELIZABETH S. SARGENT; and MICHAEL GRIFFITH,

Petitioners,

v.

BETTY MCELDERRY, Chairman of the Oklahoma State Election Board; MONA LAMBIRD, Vice-Chairman of the Oklahoma State Election Board; LANCE WARD, Secretary of the Oklahoma State Election Board; GEORGE KRUMME, Member of the Oklahoma State Election Board; and the OKLAHOMA STATE ELECTION BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court should review the constitutionality of the State of Oklahoma's ballot access laws, even though the Tenth Circuit Court of Appeals has already correctly decided this issue by applying the standard previously enunciated by this Court in *Anderson v. Celebrezze* and *Burdick v. Takushi*.

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COUNTER-STATEMENT OF THE CASE

This case concerns Oklahoma's ban on write-in voting in presidential elections, as set forth in Okla. Stat. tit. 26, § 7-127(1). Petitioners (political parties, unincorporated associations, candidates, and voters - hereinafter referred to as the "Petitioners") filed this action on March 9, 1992 in the United States District Court for the Western District of Oklahoma. Petitioners alleged that Oklahoma's write-in voting ban violated their First and Fourteenth Amendment rights to vote for candidates of choice in presidential elections. Following Respondent's filing of an answer, Petitioners dismissed their claims for injunctive relief as to the 1992 presidential election. As a result, the issue before the district court was the constitutionality of Oklahoma's ban on write-in voting in future presidential elections.

Subsequently, Petitioners and Respondent filed motions for summary judgment. In its March 26, 1993 order, the district court granted summary judgment in favor of Respondent and against Petitioners. (Pet. App. B-21a-33a).

In reaching this decision, the district court relied on the United States Supreme Court's decision in *Burdick v. Takushi*, 504 U.S. 428 (1992) which upheld the constitutionality of the State of Hawaii's ban on write-in voting. Following the analysis of *Burdick*, the district court weighed "the character and magnitude of the asserted injury" against "the precise interests put forward by the State." (Pet. App. B-22a). After finding Oklahoma's prohibition on write-in voting "presumptively valid", the court determined that Petitioners' alleged injury to their First and Fourteenth Amendment rights was "slight" and "more theoretical or illusory than real". (Pet. App. B-28a, 30a-31a). In contrast, the court found that the write-in voting ban served several important state interests: (1) discouraging "unrestrained factionalism" within Oklahoma with respect to

presidential elections so as to focus attention on major issues and candidates; (2) preventing the expenditure of public funds to count votes for fictitious candidates and candidates who are not qualified to serve or who are unwilling to serve; and (3) promoting education of its voters by ensuring that candidates place themselves on the ballot in time to offer the electorate an opportunity to examine their qualifications and positions. (Pet. App. B-32a-33a). Accordingly, the district court concluded that "Oklahoma's interests advanced as justification for the write-in voting ban in presidential elections outweigh any slight or illusory injury to the constitutional rights [Petitioners] seek to vindicate herein." (Pet. App. B-33a). The court thus found Oklahoma's statutory prohibition on write-in voting constitutional under the First and Fourteenth Amendments.

Petitioners appealed the district court's March 26, 1993 order to the United States Court of Appeals for the Tenth Circuit. Petitioners argued that the alternative methods of ballot access in Oklahoma made Oklahoma's ban on write-in voting unconstitutional. Petitioners also argued that under the Supreme Court's decision in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the district court had failed to consider the Oklahoma's filing deadline and the petition signature requirement when determining the constitutionality of the write-in ban.

The Tenth Circuit Court of Appeals reviewed the grant of summary judgment de novo. (Pet. App. A-7a). Said court agreed that the test set forth in *Anderson*, which was reiterated in *Burdick*, should be utilized to determine the constitutionality of Oklahoma's prohibition of write-in voting. (Pet. App. A-7a-9a). The Court's analysis included a review of the State's overall ballot access scheme and weighed the State's interests in ballot access restrictions against the burdens those restrictions impose on voters' rights. (Pet. App. A-4a-7a). The Tenth Circuit noted that this Court in its application of the balancing test in *Burdick*

held that "when a State's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights a prohibition on write-in voting will be presumptively valid". (Pet. App. A-8a-9a). The Court applied the *Anderson* test to determine the validity of Oklahoma's ballot access laws. (Pet. App. A-13a). The Court noted that there are four alternatives to write-in voting for a presidential elector to be listed on the general election ballot: (1) as an elector for a recognized political party, Okla. Stat. tit. 26, § 1-108, 10-101; (2) as an uncommitted elector, *id.* § 10-101; (3) as an elector for an independent candidate, *id.* § 10-101.1; or (4) as an elector for an unrecognized political party, *id.* § 10-101.2. (Pet. App. A-4a). After reviewing Oklahoma's ballot access laws the Tenth Circuit concluded that they passed "constitutional muster" and that the laws were not so restrictive that the presumption of validity was overcome. (Pet. App. A-9a, 20a).

Petitioners seek a review of the Tenth Circuit's decision from this Court and are requesting this Court to grant certiorari.

SUMMARY OF ARGUMENT

While the instant case was being litigated in the district court, this Court decided the issue of when a state's ban on write-in voting violates a citizen's first and fourteenth amendment rights guaranteed by the constitution. In *Burdick v. Takushi*, this court held that the State of Hawaii's ban on write-in voting was constitutional by analyzing Hawaiian election laws and applying the *Anderson* balancing test. This same analysis and application was used by the Tenth Circuit in the decision which Petitioners seek to have reviewed. The Tenth Circuit concluded that Oklahoma's election laws, which are analogous to Hawaiian laws, are constitutional. The Tenth Circuit found that Oklahoma's

election code imposed only a limited burden on the Petitioners' first and fourteenth amendment rights and that Oklahoma's important interests in regulating elections supported Oklahoma's disallowance of write-in voting. The Tenth Circuit held that Oklahoma's laws were not so restrictive as to overcome the presumption of validity that accompanies a States' regulatory functions regarding elections.

ARGUMENT

I. THE CONSTITUTIONALITY OF A STATE'S BAN OF WRITE-IN VOTING HAS ALREADY BEEN DECIDED BY THIS COURT.

Contrary to Petitioners' arguments, the decisions of this Court support the Tenth Circuit's decision upholding Oklahoma's ban on write-in voting. In *Burdick v. Takushi*, 504 U.S. 428, 432-442 (1992), this Court expressly held that a state's prohibition on write-in voting did not unreasonably infringe on the First and Fourteenth Amendment rights of its citizens. This Court held that when alternative procedures were in place that imposed only reasonable and non-discriminatory restrictions on the voter's rights, the regulatory interests of the states were sufficient to justify the restrictions and the ballot access laws were presumptively valid. *Burdick*, 504 U.S. at 434, 441 (1992).

In *Burdick v. Takushi*, 737 F.Supp. 582, 592 (D. Haw. 1990), the United States District Court for the District of Hawaii concluded that Hawaii's ban on write-in voting violated the registered voter's First Amendment rights of expression and association and ordered the State of Hawaii to provide for the casting and counting of write-in votes in the general election. The Ninth Circuit Court of Appeals reversed, concluding that the ban on write-in voting was a

proper exercise of Hawaii's "broad powers to regulate elections..." *Burdick v. Takushi*, 937 F.2d 415, 421 (9th Cir. 1991). This Court affirmed the Ninth Circuit's decision, thereby upholding Hawaii's ban on write-in voting. *Burdick*, 504 U.S. at 430 (1992).

In reaching its conclusion in *Burdick*, this Court first noted that although voting rights are "of the most fundamental significance", "[i]t does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick*, 504 U.S. at 433 (1992), quoting *Illinois Board of Elections v. Socialist Worker's Party*, 440 U.S. 173, 184 (1979) and *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986), respectively. This Court then announced the standard by which state election laws regulating voting must be measured.

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434 (1992), quoting *Anderson v. Celebrezze*, 460 U.S. at 789 (1983).

A. *Burdick v. Takushi* is Applicable to the Oklahoma Election Law Disallowing Write-in Votes.

Petitioners argue that *Burdick v. Takushi*, 504 U.S. 428 (1992), is distinguishable from the case at bar for several reasons. First, Petitioners contend that *Burdick* applies only to elections for state and local offices. Second, according to Petitioners, since Hawaii's election laws provide relatively easy ballot access and Oklahoma's do not, this Court's reasoning cannot be applied to Oklahoma's election laws. Respondents respectfully submit that neither argument is convincing.

Respondents acknowledge that the plaintiff in *Burdick* originally raised the issue of write-in voting as to an election for a state office. *See Burdick*, 504 U.S. at 433. The specific Hawaii election laws discussed in *Burdick* concerned state and local rather than presidential elections. However, the plaintiff in *Burdick* also claimed that "he wished to vote in future elections for other persons whose names were not and might not appear on the ballot" [Emphasis added]. *Burdick*, 504 U.S. at 430 (1992). Additionally, nothing in this Court's legal analysis in *Burdick* suggests that a different constitutional standard applies to Presidential elections than to state and local ones. Moreover, the Tenth Circuit, in its decision, *Coalition for Free & Open Elections v. McElderry*, 48 F.3d 493, 496-497 (10th Cir. 1995), recognized the fact that this Court applied the balancing test set forth in *Anderson* when reviewing Hawaii's ban on write-in voting. The Tenth Circuit noted that *Anderson* set forth the balancing test used in the context of a challenge to State laws restricting ballot access laws in a Presidential election. The Court held the following:

> Even if the specific state and voter interests to be balanced in evaluating whether to rebut *Burdick*'s presumption of validity for write-in voting bans differ in the context of Presidential election, the presumption itself still applies whenever, as here, the State's ballot access laws are constitutional.

Coalition for Free & Open Elections v. McElderry, 48 F.3d 493, 500 (10th Cir. 1995).

In the instant case, Petitioners seek the right to cast write-in votes in the general election for President. This should be noted when considering the ease of Hawaii's ballot access. When Hawaii's requirements for appearing on the ballot for state and local general elections are compared to Oklahoma's requirements for presidential elections, one does not find such a qualitative difference as to render the *Burdick* decision inapplicable. In particular, under the Hawaii election laws discussed in *Burdick*, in order for a candidate from an unrecognized party to be entitled to appear on a general election ballot, he or she would be required to have entered a "non-partisan primary" (by filing a petition containing fifteen to twenty-five signatures at least sixty days before the primary) and then to have received the lesser of ten percent of the non-partisan primary vote or the number of votes necessary to win one of the recognized parties' primaries. *Burdick*, 504 U.S. at 436 (1992). In Oklahoma, in order to appear on the general election ballot for President as an independent candidate or a candidate of an unrecognized political party, that candidate must file a petition containing signatures of at least three percent of the voters in the last previous election. *See* Okla. Stat. tit. 26, § 10-101.1, 10-101.2. Although the

three percent requirement in Oklahoma might well require more signatures than the number of votes required for a "non-partisan" candidate in Hawaii to advance to the general election, the two states' election laws are not so different as to support Petitioner's contention that ballot access in Hawaii is easy and the burden on voters' choice is light, while ballot access in Oklahoma is difficult and burdens on voter choices are heavy.

The Supreme Court and lower federal courts have frequently upheld ballot access laws analogous to Oklahoma's. *See, e.g., American Party of Texas v. White*, 415 U.S. 767 (1974)(upholding Texas statute requiring small parties to demonstrate voter support by submitting petitions signed by at least one percent of the total gubernatorial vote at the last election); *Jenness v. Fortson*, 403 U.S. 431 (1971)(upholding Georgia statute requiring independent candidates to submit petitions signed by at least five percent of the voters eligible to vote in the last election in order to be placed on the ballot); *Perry v. Grant*, 775 F.Supp. 821 (M.D. Pa. 1991)(upholding Pennsylvania law requiring independent party candidates to submit petitions containing signatures of at least two percent of the qualified electors who voted for the winning candidate in the last state-wide election).

This Court has written that "*Jenness* and *American Party* establish with unmistakable clarity that States have an "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot..." *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986), quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-789 n.9 (1983). Oklahoma's ballot access laws for political parties and for independent candidates only require this constitutionally permissible preliminary showing.

B. Oklahoma's Election Code Imposes Only a Limited Burden on Petitioners' First Amendment Voting and Associational Rights.

As noted above, Oklahoma's Election Code provides a variety of means through which electors for the office of President and Vice-President may appear on the ballot. Electors may appear through nomination by a recognized political party. Okla. Stat. tit. 26, §§ 1-108, 10-101. Alternatively, electors may appear on the ballot if the candidate to whom they are pledged files a petition containing the requisite number of signatures in compliance with the statutorily established deadlines. Okla. Stat. tit. 26, §§ 10-101(1), 10-101.1, 10-101.2.

In its assessment of Hawaii's election law in *Burdick*, this Court noted that Hawaii law offered candidates for office a variety of mechanisms by which they could appear on the ballot. 504 U.S. at 435. After surveying the various mechanisms by which individuals could appear on the ballot in Hawaii, this Court characterized Hawaii's laws as imposing a "very limited" burden on voters' rights. *Burdick*, 504 U.S. 428, 437 (1992). This Court wrote that "[t]o conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot." *Burdick*, 504 U.S. at 437 (1992), quoting *Storer v. Brown*, 415 U.S. 724, 736 n.7 (1974). It noted that the function of the election process is to "winnow out and finally reject all but the chosen candidates." *Burdick*, 504 U.S. 428, 438 (1992), quoting *Storer*, 415 U.S. at 735. Elections, the Court said, are not conducted to "provide a means of giving vent to 'short-range political goals, pique, or personal quarrels." *Burdick*, 504 U.S. 428, 438 (1992), quoting *Storer*, 415

U.S. at 735.

In the instant case, the next Presidential election will occur in November, 1996. Petitioners and its associated political parties and citizens have had since 1993 to engage in political activity leading to their recognition as political parties and the authorization to nominate candidates for President and Vice-President whose names will appear on the general election ballot (i.e., the circulation of petitions containing signatures of registered voters.) Moreover, these parties may advance their political views by engaging in a variety of other political activities protected by the First Amendment. *See Burdick*, 937 F.2d 415, 419 (9th Cir. 1991)(noting that "the prohibition on write-in voting may limit Burdick's political speech, but it does not restrict the alternative channels available to Burdick for expressing his political views.")

C. Several Important State Interests Support Oklahoma's Disallowance of Write-in Voting.

Under this Court's analysis in *Burdick*, this Court should weigh the character and magnitude of the constitutional injury alleged by the Petitioners against the "*precise interests put forward by the State as justifications for the burden imposed by* [the challenged election law]." [emphasis added]. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). This Court should consider how effectively the subject law serves the States' interests.

In *Burdick*, after finding Hawaii's laws to impose only a limited burden on voters rights to make free choices and associate politically through the vote, this court assessed the State's interest in disallowing write-in voting. 504 U.S. at 439. This Court identified two interests served by Hawaii's law. First, the law furthered the policy of "avoiding the

possibility of unrestrained factionalism at the general election." *Burdick*, 504 U.S. at 439 (1992), quoting *Munro v. Socialists Workers Party*, 479 U.S. 189, 196 (1986). This Court also noted that Hawaii's law supported the system of selecting candidates for the general election through political parties. This Court wrote:

> Hawaii's system could easily be circumvented in a party primary election by mounting a write-in campaign for a person who had not filed in time or who had never intended to run for election. It could also be frustrated at the general election by permitting write-in votes for a loser in a party primary or for an independent who had failed to get sufficient votes to make the general election ballot. The State has a legitimate interest in preventing these sorts of maneuvers, and the write-in voting ban is a reasonable way of accomplishing this goal.

Burdick, 504 U.S. at 440.

This court concluded that these legitimate state interests were sufficient to outweigh the limited burden imposed by the write-in voting ban. Burdick, 504 U.S. 428, 440 (1992). It noted that when a State's ballot access laws passed "constitutional muster", prohibitions on write-in voting are "presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme." *Burdick*, 504 U.S. at 441 (1992). This Court stated:

> In such situations, the objection to the specific ban on write-in voting amounts to nothing more than the insistence that the State record, count, and publish individual protests against the election system or the choices presented on the ballot

> through the efforts of those who actively participate in the system.

Burdick, 504 U.S. at 441. It was noted that there were other means available to voice dissension from the electoral process and that there was "no adequate basis for [their] requiring [a] State to provide and to finance a place on the ballot for recording protests against its constitutionally valid election laws." 504 U.S. at 441 (1992).

In the instant case, as noted by the District Court and the Tenth Circuit Court of Appeals, Oklahoma's disallowance of write-in votes serves several important interests. First, by disallowing such votes in the general election, Okla. Stat. tit. 26 § 7-127, discourages "unrestrained factionalism at the general election", *Burdick*, 504 U.S. at 439 (1992), quoting *Munro v. Socialist Workers Party*, 479 U.S. at 196 (1986). By limiting the general election to recognized parties and to those parties and candidates that are sufficiently well supported such that they have satisfied the petition requirements of Oklahoma's election law, the disallowance of write-in votes helps to focus the general election on major issues and candidates. This is a legitimate state interest. *See Storer v. Brown*, 415 U.S. 724, 735 (1974).

Second, the disallowance of write-in votes reduces the risk that public funds will be expended counting votes for fictitious candidates, candidates who are not qualified for office, and unwilling candidates who do not want to serve in public office. Although the State does not contend that considerations of cost alone are dispositive, surely some consideration should be given to the prudent allocation of the state's finite resources.

Third, by disallowing write-in votes for candidates not nominated by recognized political parties, candidates not

complying with Oklahoma's petition requirements for independent candidates, and candidates of non-recognized political parties, Oklahoma's Election Code, encourages discussion of issues and candidates for a substantial period of time prior to the general election. Since independent candidates and candidates of non-recognized political parties must submit petitions by July 15, Oklahoma's Election code creates an incentive for such candidates to publicize their political views early enough in the election process to allow for extended public discussion. This promotion of voter education regarding serious candidates is also an important state interest. *Burdick*, 937 F.2d 415, 420 (9th Cir. 1991)("The prohibition on write-in voting serves that interest by ensuring that candidates place themselves on the ballot in time to allow the electorate an ample opportunity to examine the candidates' positions and qualifications.") In *Burdick*, 504 U.S. 428 (1992), this Court found that analogous interests of the State of Hawaii justified Hawaii's write-in ban.

CONCLUSION

The constitutionality of a State's ban on write-in voting has already been decided by this Court in *Burdick v. Takushi*. The provisions of the Oklahoma Election code governing ballot access and the disallowance of write-in voting are analogous to the provisions of Hawaiian laws which were upheld by this Court in *Burdick*. The Tenth Circuit concluded that Oklahoma's indirect disallowance of write-in votes in Presidential and Vice-Presidential elections does not violate Petitioners' First and Fourteenth Amendment rights.

Whatever confusion there may have been over the ability of States to restrict ballot access has been resolved. Subsequent to this Court's decision in *Burdick*, there are no

splits between the circuits on this issue. For these reasons, the Court should deny the Petition for Writ of Certiorari.

Dated, Oklahoma City, Oklahoma, August 9, 1995.

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